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DATE: April 2, 2007

MEMO TO: Planning Board,

FROM: Kevin S. McDonald, Director of Community Development

RE: Proposed Citizen Petition Zoning Articles

Article # 1. Purpose and Intent

It is clear that the proponent's intent here is to insert a reference to the Land Use Section of the locally adopted Comprehensive Plan. In his explanation he quotes one of the objectives of Section 2A of the Zoning Act adopted in 1975 which included "...consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, adopted by the regional planning agency". You will note that Section 2A referenced a comprehensive plan adopted by a regional planning agency, not a locally adopted plan. You will also note that Section 2A is no longer part of M.G.L. Chapter 40A, the Zoning Act, having been deleted many years ago.

The Planning Board will have to debate the relative merits of considering only one part of the locally adopted Comprehensive Plan when making zoning decisions as opposed to the whole document (see discussion in Town Planner Paul DeCoste's memo on these proposed amendments dated April 2, 2007) but I have a more technical concern affecting the adoption of this particular proposed article.

As you are aware, a zoning bylaw may only be adopted or amended in a town pursuant to a two-thirds majority of the voters at a Town Meeting. By referencing documents in a zoning bylaw which may be amended or changed without such a Town Meeting vote we would be delegating some of the authority of the bylaw to an entity which may be altered without an affirmative two-thirds vote of a Chatham Town Meeting. This is not allowed under Chapter 40A.

Article # 2. Applicability

This proposed article seeks to tighten or further restrict those uses which are not specifically listed as allowed in the bylaw. Currently the bylaw allows the Zoning Board of Appeals, via a Special Permit, to "determine whether a use not specifically listed as a permitted use in any district should be authorized". The tests that the Zoning Board must apply is to "consider whether the proposed use is substantially different in size, operations, impacts, and other characteristics from uses permitted in the same district" and whether the proposed use is "similar to permitted uses specifically listed in the district." One could argue that there is a material difference between determinations that a proposed use is substantially different from other uses permitted in the district so as to preclude its allowance and determinations that a proposed use is so closely related to a permitted use so as to justify its treatment as a permitted use. Perhaps this proposed stringency is desirable but the proposed differences need to be clearly understood.

Article # 3. Definition of "GRADE PLANE"

This proposal would shift the establishment of "GRADE PLANE" from which building height is measured from an average of finished grades of the ground around an existing or proposed building to an average of existing grades, established prior to any filling, measured at the corners of existing or proposed buildings.

This proposal will affect the design of some future structures by further limiting the maximum height to which they may be constructed. We are already severely constraining building design professionals in Chatham (and the look of their finished products) by only permitting a maximum height of thirty feet above the present GRADE PLANE, this proposal will, in some instances, serve to further the cause of structural squatness and nontraditional building design which would certainly be a shame.

Conversely, since this proposed change establishes the starting measuring point from existing ground, it could also allow some structures to be constructed at a greater height than thirty feet. An example of this result would be a site with a knoll surrounded by relatively level ground. If we measure our GRADE PLANE at the existing ground up on the knoll and then remove the knoll down to the elevation of the existing surrounding ground we will be measuring the maximum height of a proposed structure from a point which would be several feet higher than the finished grade around the structure, thereby allowing the total height of the structure to exceed thirty feet when measured from finished grade to the highest point of the building. Obviously this proposal needs more debate.

Another drawback to a proposal such as this is the lack of current regulations governing clearing and filling. If we do not have the wherewithal to regulate land grading prior to the issuance of a Building Permit then it will be difficult to enforce an "existing grade" rule.

Article # 4. Definition of "GUEST HOUSE"

This proposal purports to clear up an ambiguity in the present bylaw but coupled with proposed Article # 10, it actually makes a number of substantive changes.

Under certain dimensional criteria, the present bylaw allows the establishment of a GUEST HOUSE which can be "separate from or part of the principal dwelling, garage or barn." In other words, a conforming GUEST HOUSE can either be in a stand-alone building or attached to the principal dwelling or attached to a detached garage or detached barn. Under the present bylaw, a guest unit authorized by Special Permit can only be established as "part of the principal dwelling." Put another way, a guest unit (occupied by a family member) can only be located within or as part of the principal dwelling; not as a stand-alone building, not as part of a detached garage or part of a barn.

This proposal would change all of this and allow guest units permitted by Special Permit to be part of detached barns and garages in addition to being allowed as part of the principal dwelling. It would also force GUEST HOUSES to be stand-alone structures and not be part of or attached to principal dwellings or detached garages or barns. These do not appear to be a beneficial changes.

Article # 10. Special Regulations; GUEST HOUSE

This article is proposed in conjunction with Article # 4 above. One of the proponent's arguments is that under the current bylaw, the Zoning Board of Appeals should only be waiving the provision of twenty thousand (20,000) square feet of buildable upland in addition to the minimum lot size required for the zoning district in which it is located and not any other land area deficiency when issuing Special Permits for "guest units" which only have one bedroom and will house a member of the immediate family occupying the principal dwelling. This section of the bylaw has never been interpreted this way and the Zoning Board of Appeals has issued many such Special Permits for guest units on lots which did not meet the minimum lot size for the zoning district in which they lay. I would submit that a change such as this which is proposed in the petition article deserves some debate on the relative merits and not be passed off as a correction to current misinterpretation of the bylaw.

This article also proposes to remove the 50% rule presently in the bylaw because of another perceived misinterpretation of the bylaw. Currently, the floor area of a GUEST HOUSE cannot exceed fifty percent (50%) of the floor area of the principal dwelling. Under this proposal there would be no more ratio of floor areas and the only limitation on the floor area of the guest house and the main house would be the maximum building coverage requirement in Appendix II of the bylaw. Since GUEST HOUSES are clearly meant to be subordinate dwellings, this proposed amendment defies logic. For example, in an R-40 zoning district an applicant with 60,000 square feet of lot area (40,000 square feet plus an additional 20,000 square feet of buildable upland) could propose to build a two and one half story principal dwelling with a footprint of 3,000 square feet and a total floor area of 7,500 square feet and a two and one half story guest house with a footprint of 3,000 square feet and a total floor area of 7,500 square feet and still meet the lot coverage requirement of the bylaw (10% or 6,000 square feet out of 60,000 square feet). This is certainly not what was intended by "subordinate dwellings."

In a larger sense, this is a section of our zoning bylaw which should possibly be reserved for a larger debate about affordable housing. As we all know, there is currently a lot of talk around Town concerning affordable housing and what goals we should be trying to achieve. Some have opined that the zoning bylaw should be loosened so as to encourage the creation of affordable housing by private interests without the expenditure of Town funds or the utilization of Town owned lands. Perhaps it is time to look at GUEST HOUSES in a broader sense as accessory dwelling units and see if something might be crafted out of them which will benefit the housing ends that we, as a Town, wish to meet. Instead of condemning "guest units" that no longer have relatives available to occupy them perhaps we should utilize them as a means to provide reasonably priced housing and help to combat the flight of our senior citizens who may have wound up with too much house to maintain and younger people who may have trouble paying large mortgages every month here in Chatham.

Article # 5. Definition of LOT

This proposal would change the definition of LOT to that which is utilized in the Subdivision Control Law, M.G.L. Chapter 41. I am unaware of any problems that the current definition has caused but I can tell you that, as part of our discussion of Nonconformities in our continuing "White Paper" work, I was going to propose that we change the definition of LOT so as to delineate it as "vacant" land. The addition of the word **vacant** to a definition of LOT would bring it into consistency with the case law on the fourth paragraph of Section 6 of M.G.L. Chapter 40A which in *Willard v. Board of Appeals of Orleans,* 25 Mass. App. Ct. 15 (1987), stated, "[t]here is nothing on the face of the fourth paragraph to suggest that it was intended to apply to anything but vacant land." Since this definition deals with the complex "grandfathered lots" issue it would seem to make more sense to have our local definition help illuminate this understanding rather than say it is an area of land either "used or available to be used."

I also do not believe that there is any material benefit to be gained by having our definition of LOT in conformity with that utilized by the Subdivision Control Law.

Article # 6. District Area Regulations

This proposal seems innocuous enough but given my thoughts expressed above on the definition of LOT, it would probably not be apt in this instance if some alternative definition were adopted.

I am also unaware of any problems caused by the present language of the bylaw.

Article # 7. Accessory Buildings and Structures

As you are aware, we recently had a couple of cases dealing with the location of air conditioning compressors and utility sheds under 100 square feet in area which were appealed to court. As you are also aware, there has been a rule by custom, not part of the zoning bylaw, here in Chatham for many years which allows sheds under 100 square feet to be located as close as six feet to a lot line regardless of the setback requirement of the zoning district in which it is located.

The court cases brought out some glaring deficiencies in this type of regulation, beyond the obvious.

As part of the bylaw rewrite it was intended to codify the rules governing the placement of all sheds within the bylaw. In addition, we intended to propose a limit on the number of sheds one could place in a yard, especially sheds under 100 square feet which would be proximate to neighboring properties. We also intended to propose a height and story limitation on all utility sheds as well as a possible prohibition on any sheds within the front yard setback. Additionally, a regulation requiring landscaping and/or buffering on anything authorized to be placed within the required setback might be advantageous. Part of the Planning Board's discussion on these proposals would necessarily include the efficacy of the regulation of utility systems such as air conditioning compressors, swimming pool filters, heaters and water pumps, heat pumps, playground equipment, storage tanks etc.

This proposed article, as written, does not address all of these issues and does not include a comprehensive enough list or examples of regulated items. In addition, it does not address the scenario whereby an air conditioning unit or other noise making apparatus might be located inside a shed with an area of less than 100 square feet; which setback applies?

This proposed regulation obviously needs more work.

Article # 8. NONCONFORMING LOTS, BUILDINGS AND USES
Section V.B. Enlargement Extension or Change

Single and Two-Family Structures

This proposed amendment is aimed at setting up a dual track for changes to single and two-family dwellings. Firstly, it proposes that alterations, reconstructions, extensions or structural changes to one or two-family dwellings that "exacerbate" an existing nonconformity shall require a Special Permit granted by the Zoning Board of Appeals. One might wonder whether "exacerbate" as used in this context is reserved for proposed work that increases the severity of an existing nonconformity or merely covers any proposal which does not comply with the zoning bylaw. The examples used would suggest the latter interpretation. Even so, the use of an inexact term like "exacerbate" is definitely not desirable.
Secondly, it proposes that alterations, reconstructions, extensions or structural changes to one or two-family dwellings that create new nonconformities where none presently exist would require the grant of a Dimensional Variance by the Zoning Board of Appeals. Unfortunately, this proposal is contrary to the established case law in this matter. In *Fitzsimonds v. Board of Appeals of Chatham,* 21 Mass. App. Ct. 53 (1985) the court found that the appropriate standard of review to be applied when the nonconforming nature of a one or two-family dwelling was being increased was the special permit procedure of the local bylaw; "...it must be submitted ...for a determination by the board of the questions whether it is 'substantially more detrimental than the existing nonconforming [structure] to the neighborhood.'" In *Willard v. Board of Appeals of Orleans,* 25 Mass. App. Ct. 15 (1987) the court explained the main question contained in the "second except" clause of Section 6 of Chapter 40A, i.e. whether the extension would "increase the nonconforming nature of said structure." The court said "We think [the

phrase, "increase the nonconforming nature of said structure"] should be read as requiring a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities **or result in additional ones**. (my emphasis added) If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit under the second "except" clause of Mass. Gen. L. Ch. 40A, §6, and any implementing by-law. Only if the answer to that question is in the affirmative will there be any occasion for consideration of the additional question illuminated in the *Fitzsimonds* case." As noted above, the additional question in the *Fitzsimonds* case was whether the proposal is substantially more detrimental than the existing nonconforming structure to the neighborhood otherwise known as the special permit process. I personally spoke with Mark Bobrowski, author of the Handbook of Massachusetts Land Use and Planning Law, the other day and he confirmed to me that a variance is not the proper procedure to review alterations, extensions, reconstructions or structural changes to one or two-family dwellings which increase the nonconforming nature of the structure or create new nonconformities.

Another change which this proposed amendment will occasion is contained in its second paragraph. This provides that "an alteration, reconstruction, extension or structural change to a conforming single or two-family residential structure situated on a nonconforming lot shall be deemed not to increase the nonconforming nature of said structure and shall not require a special permit, as long as the required setbacks and the building coverage requirements set forth in Appendix II are adhered to." Unfortunately, an applicant could construe this to mean that the height requirements of the bylaw do not apply because they are not mentioned or that the maximum story requirements do not apply because they are not mentioned and they are not coverage or setback requirements. I am sure there are other examples of the mischief a section such as this could cause.

Structures Other than Single and Two-Family Residences

This proposed section would only allow the Zoning Board of Appeals to grant a Special Permit to authorize an alteration, reconstruction, extension or structural change to structures other than one or two-family dwellings if the proposed work in all respects complied with the current bylaw. Any other work would require the grant of a Dimensional Variance. This means that the Zoning Board could not authorize the reconstruction of a commercial building in its exact same footprint by Special Permit, a Variance would be required. Since most of our nonresidential buildings are dimensionally nonconforming, this could result in a marked change in our streetscapes.

Changes in Nonconforming Uses

This proposal imports the "similarity" provision from Article # 2 above as an additional finding that the Zoning Board must make in order to authorize a change of use from one nonconforming use to another nonconforming use via Special Permit. While the separation of nonconforming uses and structures (other than one or two-family dwellings) in a zoning bylaw is a desirable goal

I question the wisdom of a regulation which allows changes in nonconforming use by Special Permit and requires the grant of a Dimensional Variance to authorize the reconstruction of a nonconforming commercial structure.

Article # 9. Section V.D.4.a. Local Grandfathering

As acknowledged in the proponent's Explanation of Proposed Zoning Amendments this proposal only seeks to memorialize an agreement for judgment in a local Land Court case. Since it will not change the present interpretation or administration of the Zoning Bylaw it would seem to be an unnecessary amendment.

In light of the fact that one of the major points for debate in our continued review of the White Paper dealing with Nonconforming Lots will be the disposition of our local, more lenient grandfathering provisions it would appear to be premature to amend this section right now especially since it will occasion no substantive change.

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